90-1616

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

Attorney for Petitioner

QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence seized pursuant to a warrant which the judge intended to issue but inadvertently failed to sign?

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OPINION BELOW

The opinion of the court below (Appendix) is reported at 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991).

JURISDICTION

The decision of the court below was entered on January 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARTICLE ONE, SECTION 14 OF THE OHIO CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

STATUTORY PROVISIONS

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FED. R. CRIM. P. 41

{See appendix}

STATEMENT OF THE CASE

On July 16, 1988, Larry E. Williams ("Respondent") was arrested and charged with one (1) count of trafficking in marijuana, a felony of the third degree.

On November 16, 1988, Respondent's motion to suppress was filed on the basis, *inter alia*, that the search violated the Respondent's Fourth Amendment right in that it was conducted pursuant to an unsigned search warrant. The motion was overruled, and a motion to reconsider was filed. The motion to reconsider was overruled on the basis of the good faith exception to the exclusionary rule. (See Excerpts

from Suppression Hearing and Order Denying Motion to Suppress, Appendix.).

The respondent subsequently entered a plea of no contest and appealed his conviction raising the following assignments of error:

1. THE LOWER COURT ERRED IN DENYING THE DEFENDANTS'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT WHERE SAID WARRANT WAS NOT BASED ON PROBABLE CAUSE.

2. THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN UNCONSTITUTIONAL SEARCH WHERE WARRANT TO SEARCH WAS NEVER ISSUED.

The Respondent went on to elaborate his Fourth Amendment claims under his respective assignments of error. The appellate court found, based solely on the second assignment of error, that the lack of the signature on the face of the warrant prejudiced the Respondent from having a fair trial and thereby reversed the trial court's ruling on the Respondent's motion to suppress. (Appendix.)

The State appealed the appellate court's ruling to the Supreme Court of Ohio, raising the following proposition of law:

THE RATIONALE BEHIND THE EXCLUSIONARY RULE IS TO DETER POLICE MISCONDUCT, NOT TO PUNISH THE ERRORS OF MAGISTRATES AND JUDGES; THEREFORE, A SEARCH WARRANT IS NOT VOID *AB INITIO* WHERE IT IS ISSUED UPON A GOOD SHOWING OF PROBABLE CAUSE, WHERE THE AFFIDAVIT UPON WHICH PROBABLE CAUSE IS BASED IS SIGNED, AND WHERE THERE IS UNREFUTED EVIDENCE AS TO THE ISSUING MAGISTRATE'S INTENT FOR THE WARRANT TO BE EXECUTED, EVEN THOUGH THE FACE OF THE

WARRANT ITSELF LACKS THE SIGNATURE OF THE ISSUING MAGISTRATE, SUCH AN ERROR BEING AN ADMINISTERIAL OVERSIGHT ON THE PART OF THE ISSUING JUDGE.

The Respondent again responded by raising the Fourth Amendment issue. The Supreme Court of Ohio affirmed the judgement of the appellate court. (See Appendix).

STATEMENT OF THE FACTS

On July 14, 1988, Dispatcher Tim Hatfield of the Fostoria Police department received a phone call from an anonymous informant about possible illegal activity at a nearby residence. The informant, a woman, was concerned about a story that her son had told her about a large number of marijuana plants being grown by his friend's father. The informant's son had spent the night at his friend's house where he observed marijuana plants both inside the house and behind the chicken coop. The informant repeatedly expressed her desire to remain anonymous, stating that she was concerned about her well-being because "the Williams fella was either on parole or probation" and because "her son was not too far and she did not want him to know that she was calling the police department." Affiant Tim Hatfield further remarked that the informant was very sincere in answering his questions and that she had a scared tone in her voice.

Later that same day, the same woman called Dispatcher Hatfield again, stating that she had received more information from her son. She said that her son had gone to a local bar with his friend to play pool where he was again shown marijuana plants being grown outside of a window at the back of the bar. She again refused to give her name and repeated her concerns about remaining anonymous. (Appendix, Affidavit B).

As a matter of coincidence, the information conveyed by this anonymous informant corroborated other information received within the previous four weeks through a confidential informant who had a prior history of supplying information to the Fostoria Police Department. This information had proved to be accurate and had resulted in two felony drug charges

presented to Wood County Grand Jury for indictments. (Appendix, Affidavit A).

On the basis of this information, Deputy Rex Russell prepared a sworn affidavit for a search warrant the following day, July 15, 1988. Deputy Russell spoke informally with the issuing Judge William McMahon regarding the search warrant, giving the Judge the information from the two informants in conjunction with sworn affidavits from Dispatcher Hatfield and Patrolman Clark (the affiant in Affidavit A). The Judge indicated there was probable cause to support the search warrant. The Judge then signed the affidavit for the search warrant but neglected to sign the face of the warrant itself. Deputy Russell testified that he saw the Judge sign the papers that he had handed to the Judge , but couldn't recall whether or not the Judge had signed the search warrant in his presence or even if he had signed it at all. He did testify however, that after the Judge signed the papers the Judge wished him good luck and advised him to execute the search warrant as soon as possible because of a problem with "leaks" of such information on past occasions. There was never any indication from the record that Deputy Russell was aware that the face of the warrant itself had not been signed, nor was there any indication that he was reckless in the execution of the warrant. Likewise, there is no indication in the record that the Respondent was aware at the time of the search that the warrant had not been signed. The search warrant was executed that evening and the property seized was inventoried the following day. The charges underlying the Respondent's conviction resulted from incriminating evidence seized during the search.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE SUPREME COURT OF OHIO TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO THE FACTS OF THIS CASE CONFLICTS WITH THE TENOR OF DECISIONS BY THIS COURT AND DECISIONS OF LOWER FEDERAL AND STATE COURTS.

The decision of the Supreme Court of Ohio is based squarely on its understanding of what the Fourth Amendment

requires, holding, "A search warrant is void *ab initio* if not signed by a judge prior to the search." The court reached its decision for several reasons.

The first of these was consideration of a state statutory provision which constitutes a sample search warrant. (See Ohio Rev. Code § 2933.25, Appendix). This sample provision is part of a statutory scheme which embodies the substantive provisions of Ohio R. Crim. P. 41, which in turn is identical to its federal counterpart, Fed. R. Crim. P. 41, save for the federal rule's provision for oral affidavits.

The Supreme Court of Ohio further reasoned that their conclusion was necessitated by Fourth Amendment requirements, stating, *inter alia*,

> In part, the Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." *Section 14, Article I of the Ohio Constitution mirrors the Fourth Amendment.* To best effectuate these rights, knowledge that a warrant has been properly issued is essential. Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity . . . .
>
> A signature requirement is indeed the best device for safeguarding an individual's rights as provided in the Fourth Amendment and Section 14, Article I of the Ohio Constitution . . . To protect this constitutional right, it is necessary to require the signature of the issuing judge on a search warrant prior to the search. *Williams, supra*, at 25, 26. (Emphasis added).

The Supreme Court of Ohio also relied on the decision of the Ohio Court of Appeals in *State v. Spaw*, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984). (Appendix). *Spaw* also dealt with an unsigned search warrant. The appellate court in *Spaw* recognized the good faith exception as enunciated in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and as adopted by Ohio in *State v. Wilmoth*, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986), but reasoned that the good faith exception does not apply where a search warrant lacks the judge's signature, as

"the officers here could not reasonably presume its validity." *Spaw*, at 79. Therefore it is apparent that the Ohio Court of Appeals based its decision, at least in part, on its understanding of what federal law requires. This erroneous reasoning was in turn followed by the Supreme Court of Ohio.[1]

Thus, "even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

A. The Decision Below Conflicts With Decisions Of This Court.

This Court has already recognized that the exclusionary rule should not be used to suppress evidence seized pursuant to a technically deficient warrant where the officers have acted in good faith. In *United States v. Leon*, 468 U.S. 897 (1984), this Court held, *inter alia*, that where the officers' conduct in the course of the search and seizure is objectively reasonable and executed in good faith, excluding the evidence seized because the search warrant is found to be constitutionally invalid will not further the ends of the exclusionary rule in any appreciable way. *Leon* dealt with a warrant that was ultimately determined to be invalid in that it was issued without the requisite probable cause. In upholding the search, this Court focused on the police conduct during the *execution* of the warrant and reasoned that the error committed was not that of the police in conducting the search, but was rather an error on the part of the magistrate in issuing the warrant. This court noted, "[E]ven assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as

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1. The dissenting opinion, per Holmes, J., joined by Resnick, J., is an almost verbatim reiteration of the State's argument in its briefs on the merits.

a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918-919.

This Court also addressed the issue of whether police should be charged with the responsibility of ensuring the warrant's technical sufficiency, stating,

> [A]n officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." [*Stone v. Powell*, 428 U.S. 465, 498 (1976).] (Burger, C.J. concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id.* at 921.

Proponents of exclusion argue that supressing evidence obtained pursuant to a technically defective warrant supported by probable cause might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. The *Leon* Court found this argument to be speculative and reasoned that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 918.

Even closer to the issue here are the facts in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In *Sheppard*, this Court upheld the search of the respondent's residence conducted pursuant to a facially deficient warrant, citing the good faith exception to the exclusionary rule. The search was to be for evidence linked to a murder, but the warrant authorized a search for controlled substances. This Court, in reaching its decision, stated in part that "the only question is whether there was an objectively reasonable basis for the officer's mistaken belief" that the warrant authorized the search that he conducted. *Id.* at 988. Clearly, in *Sheppard*, as in the case at hand, a careful examination of the warrant by the officers conducting the search would have revealed the flaw on the

warrant's face. However, unlike the officers in the instant case, the officers in *Sheppard knew* that there was a problem with the warrant's form beforehand. No such knowledge was present here. Holding the officers in the instant case to a higher standard of care than those in *Sheppard* seems inappropriate given the fact that a problem with the warrant's form here was never anticipated. The *Sheppard* Court did not consider this knowledge or lack thereof to be the controlling factor and instead elected to view the incident from the viewpoint of what the officers reasonably believed to be the scope of their authority at the time.

In light of the foregoing, the State suggests that the good faith exception finds natural application to the facts and circumstances of this case. Assuming *arguendo* that an unsigned search warrant is *per se* invalid (a point the State does not concede, *infra*), it thus needs to be considered whether the officers' reliance on the warrant was objectively reasonable. The Supreme Court of Ohio determined by inference that the officers could not have reasonably relied on a search warrant which lacked the signature of an appropriate official. Such an argument assumes that a signature was essential to the officers' subjective belief that the warrant authorized the search they had requested. It also assumes that a signature is the only possible way of ascertaining whether or not the officers' reliance was objectively reasonable. Such reasoning fails to take into consideration the circumstances surrounding the issuance of the warrant. Here, Deputy Russell witnessed the judge sign the affidavit. Whether or not the judge signed the warrant itself was not known to him at the time; however, he assumed that the judge did sign the warrant. After the judge signed the "papers," he advised Deputy Russell to carry out the search as soon as possible because of the possibility of a "leak" in the court, and even went so far as to wish the Deputy "good luck."

These facts are undisputed. Therefore, the State would suggest that what was known to the executing officers at the time needs to be considered in light of all the surrounding circumstances and a determination made as to whether they could harbor an objectively reasonable belief that their actions were authorized. The Judge at the Trial Court level did determine that the officers' belief was objectively reasonable. (Order of Common Please Court on Respondent's Motion to Reconsider and Excerpts from Suppression Hearing,

Appendix). "Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Sheppard*, at 989-990.

The instant case presents an opportunity for the Court to speak on and expand the application of the good faith exception to reasonable good faith conduct by the police -- conduct which is flawed only by a technical mistake by a neutral magistrate. The obvious importance and need for resolution of this issue to the public and to law enforcement is emphasized by the conflict between the federal courts of appeal and state courts of last resort in their attempts to resolve the issue.

B. The Decision Below Conflicts With Decisions Of Various Federal Circuit Courts of Appeals.

Aside from the good faith issue, the State submits that no substantive right of the Respondent in the case *sub judice* was violated. Nowhere does it say in the Fourth Amendment to the United States Constitution, Article I, Section 14 of the Ohio Constitution, Fed. R. Crim P. 41, Ohio R. Crim. P. 41, or Ohio Rev. Code §§ 2933.21 *et seq.* that a search warrant *must* be *signed* in order to issue. Rather, all these binding documents require the *issuance* of a search warrant.

That the signature "requirement" for search warrants is not a substantive right of a defendant or constitutionally mandated is an issue that has been explored before. In *United States v. Turner*, 558 F.2d 46 (2d Cir. 1977), the United States Circuit Court held, *inter alia*, that the signing of a search warrant is a "purely ministerial task." *Id.* at 50. The court further held that the substantive requirement of the Fourth Amendment is satisfied "[a]s long as the magistrate in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant. . . ." *Id.*

On the other hand, a showing of prejudice will justify suppression. *United States v. Burke*, 517 F.2d 372, 386 (2nd Cir. 1975). Such a showing is a prerequisite for exclusion in four circuits. See, *United States v. McKenzie*, 446 F.2d 949, 954 (6th Cir. 1971); *United States v. Dauphine*, 538 F.2d 1, 3 (1st Cir. 1976); *United States v. Hall*, 505 F.2d 961, 964 (3rd

Cir. 1974); *United States v. Kennedy*, 457 F.2d 63, 67 (10th Cir.), *cert. denied*, 409 U.S. 864 (1972). In *Turner, supra*, the United States Circuit Court promulgated the standard of "prejudice" to determine whether to suppress the fruits of a search. The court stated that if the defendant could show prejudice, i.e., that he was subjected to a search that, "[1] might not have occurred, or [2] would not have been so abrasive if the Rule [Fed. R. Crim. P. 41] had been followed," such a showing would justify suppression. *Turner*, at 52, quoting *Burke, supra*. As noted previously, the substantive procedures of Fed. R. Crim. P. 41 require the determination of probable cause by a neutral and detached magistrate. This procedure was followed in *Turner* and in the case at hand, pursuant to Ohio R. Crim. P. 41, which is essentially the same in substance as its federal counterpart. Since the mandates of the respective rules were followed in each case, it is hardly conceivable that the Respondent here can claim prejudice. It should also be noted that the magistrate's error here did not involve an error in judgment in determining probable cause. Yet the Supreme Court of Ohio, in affirming the decision of the Ohio Court of Appeals, found the Respondent was prejudiced and prevented from having a fair trial.

Thus, it is apparent that the decision of the Supreme Court of Ohio is in conflict with decisions of various United States courts of appeals on this Fourth Amendment issue.

C. The Decision Of The Court Below Conflicts With Decisions Of Other State Courts Of Last Resort.

In *Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, ___ U.S. ___, 110 S. Ct. 497, 107 L. Ed. 2d 501 (1989), the Supreme Judicial Court of Massachusetts found that the inadvertent failure of a judge to sign a search warrant is no more than a "clerical error" that does not nullify the warrant where the judge intended to issue the warrant and where he signed the officer's affidavit (facts strikingly similar to the facts here).

In *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14 (1973), an unsigned search warrant was held valid even though the state statute governing search warrants *specifically provided* that a search warrant *must be signed* in order for it to issue. The Arizona court noted that the judge's

signature on the affidavit supported the state's contention that the judge intended for the warrant to issue.

Another case which may provide direction for a decision here is *State v. Spaulding*, 239 Kan. 439, 720 P.2d 1047 (1986), wherein it was held that when a judge issues a warrant upon a finding of probable cause and intends that it be executed, but where he fails to sign the warrant itself, the court will look to the judge's intention at the time the warrant is issued.

The common theme among these cases suggests that the Fourth Amendment was designed to protect against *unreasonable* searches and seizures, and that the reasonableness of a search needs to be examined in light of the circumstances of each particular case. The evil perceived by the framers of the Constitution was not mere technical deficiencies on the face of search warrants, but the general search and seizure or the overreaching warrant. As Justice Stevens points out:

> All that our cases require is that a warrant contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize. The test is whether the executing officers' discretion has been limited in a way that forbids a general search. *Leon, supra*, at 964. (Stevens, J., concurring in part, dissenting in part.)

"Since the affidavit was available for after the fact review, the . . . courts could readily ascertain the limits of the officer's authority under the warrant. *Id.* at 964. In the instant case, the affidavit upon which the warrant was issued specifically enumerated where the search was to take place and clearly stated its objectives. "[T]his search posed none of the dangers to which the Fourth Amendment is addressed. It was justified by a neutral magistrate's determination of probable cause and created no risk of a general search. It was eminently 'reasonable'." *Id.* at 966. (Stevens, J., concurring in part, dissenting in part). In the case *sub judice*, whether or not the warrant "issued" properly as required under the Fourth Amendment and not whether it was merely signed should be the pertinent question.

D. State Courts Are In Conflict Over This Issue.

Some courts have attempted to make the distinction between warrants which are merely "voidable" and those which are "void *ab initio*." E.g., *State v. Williams*, 57 Ohio St. 3d 24, 565 N.E.2d 563 (1991); *State v. Suroweicki*, 184 Conn. 95, 440 A.2d 798 (1981); *Byrd v. Commonwealth*, 261 S.W. 2d 437 (Ky. 1953); *People v. Hentowski*, 154 Mich. App. 171, 397 N.W.2d 255 (1986). In each of these cases, the courts found that technical deficiencies or clerical errors rendered the warrants void. Probable cause was not an issue. In *Leon*, however, *probable cause itself* was lacking, yet the search was upheld. In cases such as the instant case, the courts found the warrants "void", while in cases such as *Leon*, the warrant was merely "voidable".

Further, in cases such as *Williams*, the evidence seized was suppressed because of technical deficiencies in otherwise good warrants, while in *Leon* and its progeny evidence was held admissible even though the warrants were not based on probable cause. Surely, it must be correct to allow in "good" evidence seized pursuant to a technically deficient warrant where probable cause existed if in fact we allow in evidence seized pursuant to a "bad" warrant lacking in probable cause itself.

> [E]xcluding the evidence here will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. *Leon*, at 920, quoting *Stone v. Powell*, 428 U.S. 465, 539-540 (1976). (White, J., dissenting).

"This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, at 920. "Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence." *Id.* at 920, n.21, quoting

the Attorney General's Task Force on Violent Crime, Final Report at p. 55 (1981).

CONCLUSION

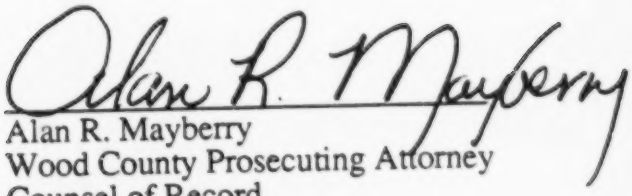
This is a matter of first impression for this Court. The Supreme Court of Ohio summarily ruled that an unsigned search warrant is void *ab initio* and failed to address the issue of the intent of the issuing magistrate or the circumstances surrounding the issuance of the warrant . The search warrant in the instant case was issued only after a good showing of probable cause. The police officers did everything in their power to obtain the warrant. Furthermore, they performed responsibly and professionally while executing the warrant and the evidence seized was probative of the criminal activities the police had suspected and which they expected to uncover upon the execution of the warrant.

There is no evidence that the police were reckless in preparing the affidavits upon which probable cause was based. The only error committed was not on the part of the police, but was that of the issuing judge. The intent of the issuing judge was clear through the testimony presented and his signing the affidavit. Exclusion in this case would do nothing to advance the interests of the Fourth Amendment; therefore, the search in this case should be upheld.

While a judge's signature on the face of the warrant may be a factor in determining whether or not the judge intended for the warrant to issue, it should not be the ultimate element nor the only means by which a determination can be made. The State is in no way suggesting that a signature is never necessary, or that warrants should routinely issue without signatures, or even that it is "O.K." for warrants to sometimes issue without the issuing magistrate's signature. Such an oversight is a mistake on the part of the issuing judge. However, what the State is suggesting is that suppression in cases where the executing officers act in reasonable reliance on what they believe to be a validly issued warrant would not serve the interests of the Fourth Amendment.

For all of the foregoing reasons, the State of Ohio respectfully requests this Court to grant the petition for the writ of certiorari to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,



Alan R. Mayberry
Wood County Prosecuting Attorney
Counsel of Record
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

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SUPREME COURT, JANUARY TERM, 1991
Opinion, per Douglas, J.

THE STATE OF OHIO, APPELLANT,
v.
WILLIAMS, APPELLEE

[Cite as *State v. Williams* (1991), 57 Ohio St. 3d 24.]

Criminal law --Search and seizure--Search warrant is void ab initio if not signed by a judge prior to the search.

O.Jur 3d Criminal Law §§ 521, 525.
A search warrant is void *ab initio* if not signed by the judge prior to the search.

(No. 89-2204--Submitted September 19, 1990--Decided January 9, 1991.)

APPEAL from the Court of Appeals for Wood County, No. WD-89-30.

On July 16, 1988, Larry E. Williams, appellee, was arrested and subsequently indicted for trafficking in marijuana, a violation of R.C. 2925.03. Appellee was charged based upon evidence obtained during a search of his home. A search warrant was issued for the search; however, the warrant was never signed by the issuing judge.

Prior to trial, appellee moved to suppress evidence obtained in the search. That motion was overruled. Subsequently, appellee withdrew his former plea of not guilty and entered a plea of no contest to the charges against him. Appellee was convicted and, thereafter, appealed his conviction.

The court of appeals reversed and remanded. The appellate court determined that the search warrant was void *ab initio* and held that all evidence seized in the search of the appellee's home should be suppressed.

This cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Alan R. Mayberry, prosecuting attorney, *David E. Woessner* and *Jeffrey P. Nunnari*, for appellant.

John P. Duffin, county public defender, for appellee.

Douglas, J. The issue presented to this court is whether a search warrant is void *ab initio* when the face of the document lacks a judge's signature. We find that it is. Therefore, any evidence obtained pursuant to such a search warrant must be suppressed.

The issue of whether a search warrant is void if not signed by a judge prior to a search was addressed by the court in *State v. Spaw* (1984), 18 Ohio App. 3d 77, 18 OBR 242, 480 N.E. 2d 1138. In *Spaw*, evidence was obtained in a search of the defendant's car. The search warrant authorizing the search had not been signed by the judge prior to that search. The court determined that the evidence obtained should be suppressed because the search warrant was defective. *Id.* at 79, 18 OBR at 244, 480 N.E. 2d at 1140. The court reasoned that "* * * what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void *ab initio*." *Id.* at 79, 18 OBR at 244, 480 N.E.2d at 1140.

This issue is one of first impression for this court. We recognize that some other jurisdictions have held an unsigned search warrant valid when the intent to sign was clear. Such courts have held, absent any statutory provision such as R.C. 2933.25, that where the judge's failure to sign is only a "mere oversight", the search warrant will not be found to be invalid. See, *e.g., Yuma Cty. Attorney v. McGuire* (1973), 109 Ariz. 471, 512 P.2d 14; *State v. Spaulding* (1986), 239 Kan. 439, 720 P.2d 1047. However, we believe the better view is that expressed in *Spaw*, that a search warrant is void *ab initio* if not signed by a judge prior to the search.

We reach our decision for several reasons. Search warrants are issued pursuant to the authority found in R.C. 2933.21 and Crim. R. 41. R.C. 2933.25 dictates the form of a search warrant.[1] Included in the example form is the issuing

judge's signature. Further, R.C. 2933.24(A) provides that "* * * [s]uch warrant *shall command* the officer to search such house or place or person named or described for the property or other things * * *." (Emphasis added.) A command without a known commander cannot be a command.

Indeed, the Supreme Court of Connecticut has recognized that a lawful signature on a search warrant, by the person authorized to issue it, is essential to its issuance. *State v. Surowiecki* (1981), 184 Conn. 95, 440 A. 2d 798. The court in *Surowiecki* concluded that a search warrant, which had been used to obtain evidence necessary for the defendant's arrest and which had not been signed by a judge prior to the search, did not issue under Connecticut law. *Id.* at 97, 440 A. 2d at 799. The court reasoned that only when the judge had affixed his signature to the search warrant would the search warrant be said to have been issued. *Id.* The signing of a search warrant is the only identifiable objective manifestation of judge's subjective intent to issue a search warrant.

In part, the Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Section 14, Article I of the Ohio Constitution mirrors the Fourth Amendment. To best effectuate these rights, knowledge that a warrant has been properly issued is essential. Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity.

In *People v. Hentkowski* (1986), 154 Mich. App. 171, 397 N.W. 2d 255, the court recognized several important reasons for requiring the signature of the issuing judge on a search warrant. The fact scenario in *Hentkowski* parallels that in the case at the bar. The defendant in *Hentkowski* was convicted of two counts of possession of an illegal substance based on evidence obtained in a search of his home. The search was conducted pursuant to a search warrant which had never been signed by a magistrate prior to the search. In reversing the defendant's convictions for possession, the Michigan court of appeals held that "* * * an unsigned search warrant is necessarily invalid." *Id.* at 179, 397 N.W. 2d at 259. The court determined that the signature allows one to distinguish between and actual warrant and one that is legally unenforcable. *Id.* at 177, 397 N.W. 2d at 258. Further, the

signature requirement provides both protection and assurance to property owners faced with the threat of a search of their property, in that they may review the document and determine whether or not they are required to allow officers to conduct the search. *Id.* at 179, 397 N.W. 2d at 259.

A signature requirement is indeed the best device for safeguarding an individual's rights as provided in the Fourth Amendment and Section 14, Article I of the Ohio Constitution. Signature requirements have long been recognized as fulfilling cautionary functions in protecting an individual's rights. As examples, in Ohio, we have signature requirements for wills and the transfer of real property. For an interest in land to be conveyed, Ohio law requires a writing signed by the party (or his agent) granting the interest conveyed. R.C. 1335.04. Also, a will (except an oral will) is invalid unless it is in writing and signed by the maker or another individual at the maker's direction. R.C. 2107.03. Certainly, the protection of one's right as guaranteed by the United States Constitution and the Constitution of this state to be free from unreasonable searches and seizures should not be granted any less protection than that afforded to property rights. To protect this constitutional right it is necessary to require the signature of the issuing judge on a search warrant prior to the search.

Accordingly, we hold that a search warrant is void *ab initio* if not signed by a judge prior to the search. Evidence seized pursuant to such an invalid warrant must be suppressed.

The judgement of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY and H. BROWN, JJ., concur.

WRIGHT, J., concurs in judgment only.

HOLMES and RESNICK, JJ., dissent.

HOLMES, J., dissenting. I must dissent in that I strongly disagree that all search warrants which do no have the issuing judge's signature thereon are void *ab initio*. I do agree with the majority that better policy would dictate that the issuing judge's signature be placed upon the search warrant. However, there are instances when a strict adherence to such policy results in the "baby being thrown out with the bath

water." All the facts in this matter, including the affidavit of Deputy Russell for the procurance of the search warrant which was signed by the judge who issued the warrant, show that the warrant was knowingly issued by the judge based upon probable cause, and executed properly by the deputy sheriff who had obtained the warrant.

The background facts which occasioned the warrant are briefly that an informant contacted the Fostoria Police Department on two occasions concerning marijuana-growing activities within her immediate knowledge. This information corroborated prior information from another informant who had previously worked with that police department. Deputy Russell, on the basis of such information, prepared a sworn affidavit for a search warrant and spoke with the judge about issuing the warrant. The judge agreed that there was probable cause to issue the warrant and acknowledged Deputy Russell's signature upon the affidavit. Although signing the affidavit, the judge overlooked placing his signature upon the face of the search warrant as issued.

Both the affidavit seeking the search, and the warrant, specified the property of the defendant, Larry E. Williams, that was to be searched for and seized, and that was "[m]arijuana plants, growing paraphernalia, and any equipment relative to the cultivation, manufacture, or engagement in any part of the production of any controlled substance."

Deputy Russell testified that he saw the judge sign the papers that he had handed to the judge, but could not recall whether or not the judge had signed the search warrant in his presence or even if he had signed it at all. He did testify, however, that after the judge signed the papers the judge wished him good luck and advised him to execute the search warrant as soon as possible because of a problem with "leaks" of such information on past occasions.

The search warrant was executed the next morning without any indication in the record that the search was conducted in any other than a proper manner. The property was seized and inventoried including growing marijuana plants, bagged marijuana plants, potted marijuana plants, a marijuana seed catalog, a marijuana leaf-style belt buckle, and many other marijuana growing and utilization paraphernalia. Williams was charged with and convicted of the possession of such materials.

It is my position that this warrant should be upheld, and the property held to be properly seized and not subject to suppression upon two bases. First, in that it has been clearly shown that the issuing judge had intended to command the search by acknowledging the affidavit of the procuring officer, this warrant was valid from its inception. Second, ministerial oversights, as here, should not void otherwise proper warrants and hold for naught the good faith efforts of a law enforcement officer who had properly and lawfully executed the authorization of such search warrant.

While the absence of a judge's signature on the face of a search warrant may be a factor in determining whether or not the judge intended for the warrant to issue, it should not be considered the only element by which such determination is made. Such an absence of a signature may be, as here, an oversight upon the part of the judge, and suppression in such instances where the executing officer acted in reasonable reliance upon what he believed to be a validly issued warrant would not serve in the best interests of the Fourth Amendment. Such was the conclusion of the United States Supreme Court in *United States v. Leon* (1984), 468 U.S. 897, where the court stated: "[A]s cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.'" *Id.* at 910. Applying the good-faith-of-the-officer rule, the court stated that "* * * [p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921.

Ohio adopted the good faith exception in *State v. Wilmoth* (1986), 22 Ohio St. 3d 251, 22 OBR 427, 490 N.E. 2d 1236. In *Wilmoth*, this court held, at paragraph two of the syllabus, that "[w]here the officer's conduct in the course of the search and seizure is objectively reasonable and executed in good faith, excluding the evidence seized because the search warrant is found to be constitutionally invalid will not further the ends of the exclusionary rule in any appreciable way." *Wilmoth* dealt with a search warrant issued on an oral affidavit, contrary to the requirements of Crim. R. 41(C), and where the officers did not testify under oath as required by the United States Constitution and the Ohio Constitution. In upholding the

search, this court focused on the police conduct during the *execution* of the warrant and correctly reasoned that the error committed was not that of the police in conducting the search, but rather was an error on the part of the magistrate in issuing the warrant. This court noted: " 'An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake.' * * * Enforcement of the exclusionary rule suppressing evidence as a result of error by a magistrate can never deter future police misconduct." (Emphasis deleted.) *Id.* at 266, 22 OBR at 439-440, 490 N.E. 2d at 1247-1248.

In reaching its conclusions in *Wilmoth*, this court relied heavily on the language of *Leon, supra,* and stated at 265, 22 OBR at 439,490 N.E. 2d at 1247, that "ordinarily it is not the responsibility of the officer to question the probable cause determination made by the magistrate or whether the warrant is technically deficient."

When applying the principles enumerated in *Leon*, the determination of whether or not exclusion is an appropriate remedy involves a two-step inquiry. The first step deals with whether or not a valid search warrant existed. If so, the good faith issue need not be considered. If, however, this first question is answered in the negative, then it needs to be determined if the good faith exception, in light of the facts and circumstances of the particular case, can be appropriately applied. See *Wilmoth, supra.*

There is no "signature requirement" for search warrants provided by statute in Ohio, by Constitution or by rule, and such signature must be considered as only ministerial in nature.Therefore an unsigned warrant, *per se*, does no violence to a substantive right of the defendant. Although the Constitution and the statutes do not specifically require such a signature, the majority here mandates such a signature to validate an otherwise proper warrant and search pursuant thereto.

That the signature "requirement" for search warrants is not a substantive right of a defendant or constitutionally mandated is an issue that has been explored before. In *United States v. Turner* (C.A.2, 1977), 558 F. 2d 46, the United States Circuit Court of Appeals held, *inter alia*, that the signing of a search warrant is a "purely ministerial task." *Id.* at 50. The court further held that the substantive requirement of the Fourth

Amendment is satisfied '[a]s long as the magistrate in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant * * *." *Id.*

In *Commonwealth v. Pellegrini* (1989), 405 Mass. 86, 539 N.E.2d 514, the Supreme Judicial Court of Massachusetts found that the inadvertent failure of a judge to sign a search warrant is no more that a "clerical error" that does not nullify the warrant where the judge intended to issue the warrant and where he signed the officer's affidavit (facts strikingly similar to the facts here).

In like manner, in *State v. Spaulding* (1986), 239 Kan. 439, 720 P.2d 1047, it was held that when a judge issues a warrant upon finding of probable cause and intends that it be executed, but where he fails to sign the warrant itself, the reviewing court will look to the judge's intention at the time the warrant is issued.

In a number of jurisdictions, a showing of prejudice to the defendant is necessary in order to suppress the evidence where the warrant was obtained and executed in good faith. *United States v. Burke* (C.A.2, 1975), 517 F.2d 377; *United States v. McKenzie* (C.A.6, 1971), 446 F.2d 949; *United States v. Turner, supra.* The common thread which runs through these cases is to the effect that the Fourth Amendment was designed to protect against *unreasonable* searches and seizures, and that the reasonableness of a search needs to be examined in light of the totality of the circumstances of each case.

The search warrant in the instant case was issued only after a good showing of probable cause. The law enforcement officers did everything in their power to obtain the warrant. Furthermore, the deputies performed responsibility and professionally while executing the warrant and the evidence seized was highly probative of the criminal activities the officers had suspected and which they had hoped to uncover upon the execution of the warrant. There is no evidence that the officers were reckless in preparing the affidavits upon which probable cause was based. The only error committed was not on the part of the officers, but was that of the issuing judge. The intent of the issuing magistrate is clear through the testimony presented and the signing of the affidavit. Exclusion in this case would do nothing to advance the interests of the Fourth Amendment, nor would such suppression serve to advance the best interests of the judicial

process, or serve the interests of the general public in abating crime; therefore, the search in this case should be upheld.

On the basis of all the foregoing commentary, I would reverse the judgment of the court of appeals.

RESNICK, J., concurs in the foregoing dissenting opinion.

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[1]R.C. 2933.25 provides, with emphasis added:

"Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:

"State of Ohio, ...County, ss:

"To the sheriff (or other officer) of said County, greeting:

"Whereas there has been filed with me an affidavit, of which the following is a copy (here copy of the affidavit).

"There are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of the said . . . . . township of . . . . . in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E.F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to the law.

"Given under my hand, this . . . . . day of . . . . . .

"A.B., Judge, County Court"

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF WOOD

C. A. NO. WD-89-30

State of Ohio	APPEAL FROM
APPELLEE	WOOD COUNTY COMMON PLEAS COURT
-VS-	NO. 88-CR-329
Larry E. Williams	
APPELLANT	DECISION AND JOURNAL ENTRY

DATE November 17, 1989

This case is an appeal from appellant's conviction for violation of R.C. 2925.03. He asserts two assignments of error as follows:

"FIRST ASSIGNMENT OF ERROR
THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT WHERE SAID WARRANT WAS NOT BASED ON PROBABLE CAUSE.

"SECOND ASSIGNMENT OF ERROR
THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN UNCONSTITUTIONAL SEARCH WHERE WARRANT TO SEARCH WAS NEVER ISSUED."

Procedurally, appellant was arrested and ultimately indicted for violation of R.C. 2925.03. He filed a motion to suppress evidence seized pursuant to a purported search warrant. Following a hearing, said motion was denied.

Thereafter, appellant pled no contest, consented to a finding of guilty, and was sentenced accordingly. This appeal followed.

The court first considers appellant's Assignment of Error No. 2. He alleges that the search warrant in question was a nullity in that it lacked the signature of the issuing magistrate and cites the case of *State v. Spaw* (1984), 18 Ohio App. 3d 77, in support of his position. Appellee acknowledges in its brief and in oral argument the existence of this authority but suggests that *State v. Spaw* does not speak to the issue of the judge's intent when determining whether or not to issue a search warrant and further argues that evidence of said intent should be considered in light of *United States v. Leon* (1984), 468 U.S. 897. Appellee argues that the good faith exception enunciated in *Leon* should be considered together with the evidence of the judge's intent, to allow the search warrant to stand in this case.

This court has considered the record and the existing law and finds that the rationale of *State v. Spaw* is compelling to a resolution of this case. In the syllabus of the *Spaw* case, the Court of Appeals for Defiance County stated:

> "A search warrant issued without the signature of either the judge who issued the warrant or the clerk of court, and which lacks any signature at all, is void *ab initio*, and the fruits of such a warrant will be suppressed."

We find the rationale of the *Spaw* case to be controlling in this instance. Appellant's second assignment of error is found well-taken.

Having found the second assignment of error well-taken, it is unnecessary to address the matters raised in appellant's first assignment of error. It is therefore found moot and not well-taken.

On consideration whereof, the court finds that the defendant was prejudiced and prevented from having a fair trial, and the judgment of the Wood County Court of Common Pleas is reversed. This cause is remanded to said court for further proceedings not inconsistent with this decision. It is ordered that appellee pay the court costs of this appeal.

Peter M. Handwork, P.J.

John J. Connors, Jr., J.

Charles D. Abood, J.
CONCUR.

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

34 thru 48

THE STATE OF OHIO, APPELLANT,
v.
SPAW, APPELLEE.

THE STATE OF OHIO, APPELLANT,
v.
NOLAN, APPELLEE.

[Cite as State v. Spaw (1984),
18 Ohio App. 3d 77.]

Criminal law --Search and seizure-- Warrant containing no signature at all void ab initio -- Motion to suppress sustained.

O.Jur 3d Criminal Law § § 521, 525.

A search warrant issued without the signature of either the judge who issued the warrant or the clerk of court, and which lacks any signature at all, is void *ab initio,* and the fruits of such a warrant will be suppressed.

(Nos. 4-83-19 and -20--Decided November 14, 1984.)

APPEAL: Court of Appeals for Defiance County

Stephen W. Ruyle, for appellant.

Wyss, Mochamer, Roby, Ryan & Myers, Harold W. Myers and Gregory M. Antalis, for appellees.

GUERNSEY, J. These appeals by the state of Ohio are from judgments rendered by the Court of Common Pleas of Defiance County suppressing evidence seized by police authorities after search of a motor vehicle under the purported authority of search warrants issued out of the trial court.

The vehicle, of which ownership was not claimed by either of the defendants, was, prior to its impoundment and the search and seizure following impoundment, driven by the defendant Lee E. Nolan with the defendant Jerry L. Spaw as a passenger. Neither Nolan nor Spaw claimed ownership of the personal property, consisting of alleged burglary tools, as well as other property, seized after the search. Each of the defendants moved for the suppression of this evidence on various grounds. After a common hearing of the motions the

trial court rendered its judgments from which these appeals were taken, each in the following pertinent words:

"This matter was heard upon the motion of the defendant to suppress evidence seized under authority of a search warrant.

"The first objection to the search arises from defendant's claim that the search warrant did not contain the signature of the Judge who issued the search warrant, nor by the Clerk of Court.

"While it is permissible for the Clerk to issue a search warrant upon order of the Judge, *State v. Kuykendoll* (1977), 51 Ohio App. 2d 215 [5 O.O.3d 354], a search warrant issued without the signature of the Judge or the Clerk is clearly invalid. Here, neither the Judge nor the Clerk signed the search warrant itself. Therefore the Court finds the search warrant invalid and orders the items seized under authority of the warrant be suppressed.

"The Court further finds that the state's claim that the items seized should be admitted because the officer had probable cause to search the vehicle at the time of the arrest, must also fail. The evidence indicates that the vehicle was towed to a garage without an inventory being made of the contents. It was only later that it was searched under authority of an invalid search warrant. After a vehicle has been taken to a garage for safe-keeping, a valid search warrant is necessary. *State v. Bernius* (1964), 177 Ohio St. 155 [29 O.O.3d 359], and *Ohio v. Waldbillig* (1964), 1 Ohio st. 2d 50 [30 O.O.2d 28].

"Having found the search to be invalid due to defects in the search warrant, the Court will not discuss nor act upon the other claims of defendant."

The following assignment of error is common to both appeals:

"Defendant charged with crimes of possession may claim the benefits of exclusionary rule only if their [*sic*] own 4th amendment rights have in fact been violated. Where defendant claims no ownership or possessory interest either in the place searched or the items seized the defendant is not entitled to claim the benefits of the exclusionary rule. The trial court erred when granting defendant's motion to suppress where the defendant asserted neither ownership nor possessory interest in the place searched or items seized."

Although this might have been a valid claim if properly raised, it is clear from the trial court's judgment that it elected neither to "discuss nor act upon" this claim by the state, in the same manner as it refrained from discussing or acting upon the other claims of defendant. In any event, examination of the record, including the transcript of the hearing proceedings on the motion to dismiss, discloses that this claim by the state as to the lack of standing on the part of the defendants to contest the seizure was never raised by the state in the trial court.

Accordingly, the issue attempted to be raised by the state under this assignment of error has not been preserved for review by this court and, for such reason, we find this assignment of error, as to each appeal, to be without merit.

In the appeal of the *Nolan* case the state assigns as a second assignment of error:

"When an affidavit in support of a request for a search warrant, is executed properly by the previously sworn officer, in the presence of the reviewing judge, and signed by such judge, and when such judge executes a journal entry requiring the issuance of a search warrant, but further the issuing judge fails to execute the original search warrant, such failure is a ministerial oversight, and should not be fatal to the warrant intended to be issued."

The state's only argument for this position is that such error is merely ministerial in nature, which, under the authority of *United State v. Wyder* (C.A. 6, 1982), 674 F.2d 224, does not invalidate the search warrant. However, in that case the defect considered in the search warrant was a misstatement that the search under the warrant must be completed within five hours, rather than within five days. The warrant had been properly issued in all other respects and the appellate court regarded the defect insignificant and not sufficient to void the warrant.

Here, the trial court held the search warrant issued without the signature of either the "Judge" or the "Clerk" clearly invalid. In essence it said that the document did not constitute a search warrant *ab initio*. As to this, we agree.

Crim. R. 41 prescribes as to search warrants:

"(A) A search warrant authorized by this rule may be issued *by a judge of a court of record* * * *." (Emphasis added.)

"(C) * * * If the judge is satisfied that probable cause for the search exists, *he shall issue a warrant* * * *." (Emphasis added.)

"(D) * * * Property seized under a warrant shall be kept for use as evidence *by the court which issued the warrant* * * *." (Emphasis added.)

"(E) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk."

We are fully familiar with the recent decisions of the Supreme Court of the United States in the cases of *United States v. Leon* (1984), 82 L.Ed.2d 677, and *Massachusetts v. Sheppard* (1984), 82 L.Ed.2d 737, wherein it was held, respectively, notwithstanding that probable cause for the issuance of a search warrant did not exist, "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause" (82 L.Ed.2d at 700-701), and, where police officers, who were advised by a judge that all necessary clerical changes had been made in a defective warrant form, took every step that could reasonably be expected of them, there was an objectively reasonable basis for their mistaken belief that the search warrant authorized the search which the officers conducted, and the exclusionary rule would not be applied since the officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate which subsequently was determined to be invalid.

In the former of these cases the Supreme Court emphasized that the purpose of the exclusionary rule is the deterrence of illegal conduct on the part of the police officials and that when the warrant is facially valid, and their conduct is objectively reasonable, the fruits of the warrant will not be suppressed. The court additionally pointed out that it has expressed a strong preference for warrant searches and had declared that "'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.'" 82 L.Ed.2d at 693. It likewise recognized at 699:

"* * * Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient * * * that

the executing officers cannot reasonably presume it to be valid." 79 Corpus Juris Secundum (1952) 776, Searches and Seizures, Section 1, defines "search warrant":

"* * * to be an order in writing in the name of the state, *signed by a magistrate* and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate." (Emphasis added.)

See, also, *Kovacs v. State* (1921), 24 Ohio N.P. (N.S.) 1, 2, which would also permit signature by the court clerk.

In our opinion, what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void *ab initio*. Moreover, with such defect being readily apparent on the face of the instrument it cannot be said that the officers exercising the "warrant" acted in good faith.

Accordingly, we find the second assignment or error in the *Nolan* case not well-taken.

Having found no error prejudicial to the state of Ohio, appellant herein, in either the *Spaw* case or the *Nolan* case, the judgments of the trial court suppressing as evidence the personal property seized by the execution of the void search warrant are hereby affirmed and the two causes are remanded to the trial court for further proceedings as are provided by law.

Judgments affirmed.

MILLER, P.J., and COLE, J., concur.

Excerpts from Suppression Hearing

MR. DUFFIN, (Counsel for Respondent): There is also, then, I think another problem with this process in that the search warrant perhaps was never issued, in that there is no search warrant that has been executed by Judge McMahon for whom, and in front of whom this affidavit for search warrant was presented. I think that is a problem borne out on the first page of the Joint Exhibit that is presented to the court which is, in fact, the search warrant itself, which has to, of course, pursuant to the Fourth Amendment and Ohio Constitution, and Criminal Rule 41, has to be issued by an independent neutral magistrate. If there is a warrant that has not been issued, then, of course, I think that this becomes a warrantless search, and those issues then shift the burden to the state of Ohio to prove that this warrantless search was done within a proper exception to the Ohio and United States Constitution.

Thank you judge.

(R. pp. 9-10)

* * *

THE COURT: The Court will then decide based on what it has. The present state of the evidence would indicate to the court that there was an intent, and by error or accident or by loss of the original, the court did, in fact, intend to issue a search warrant and the court, because of that reason, taking into account the intimate contact between the officers and the judge, the fact that an inventory was, in fact, filed relative to that, and considering the crux of the argument of counsel for the defense relative to the sufficiency, the court first of all finds that there was intent to issue the search warrant and so, therefore, overrules the defendant's argument that because the signature on the search warrant, in fact, does not show up on this copy, that the error would be an error which was caused by accident or other inadvertence, and therefore would be insufficient to overcome the factual basis that he intended to execute it and is was, therefore, valid.

From that viewpoint, likewise, then, dealing with the affidavit as to the sufficiency, the court would believe that based on what it has before it, that the totality of the

circumstances in this case would, in fact, justify the issuance of a warrant by Judge McMahon, and therefore would overrule the motion to suppress in this case.

MR. WOESSNER: Thank you, your Honor.

MR. DUFFIN: Thank you, judge.

THE COURT: Thank you gentlemen.

(Court adjourned.)
(R. pp. 36-37).

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,
Plaintiff

CASE NO. 88-CR-329

vs

Decision

Larry Williams
Defendant.

November 17, 1988

This cause was before the Court on November 17, 1988 for hearing on Defendant's motion to suppress. Present were David Woessner, Assistant Prosecuting Attorney, for the State and the Defendant with his counsel John P. Duffin, Esq.

The Court heard the testimony of one witness after which the Court ruled that the motion to suppress was not well taken and should therefore be overruled.

Counsel for defendant further made a motion to suppress certain items found on the inventory sheet as the items were outside the scope of the warrant.

The Court found that this matter should be addressed as a motion in limine prior to trial in this case.

It is therefore Ordered, Adjudged and Decreed that defendant's Motion to Suppress is hereby Overruled. This case continued for jury trial.

Judge Donald A. DeCessna

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,
Plaintiff

vs

Larry Williams
Defendant.

CASE NO. 88-CR-329

Order

Judge Donald A. DeCessna

December 21, 1988

* * * * * * * * * * *

This cause was before the Court on Defendant's motion to reconsider Defendant's motion to suppress. The State has filed a response to the motion to reconsider.

Upon review of the motion, the response and the law applicable thereto the Court finds that evidence adduced at the suppression hearing showed that the issuing magistrate intended to issue the search warrant and that the officers, from discussion with the Judge, acted in reasonable reliance that the search warrant had indeed been issued and was valid.

Therefore under the authority of *United States v. Leon*, (1984), 82 L.Ed.2d 677, it is hereby Ordered, Adjudged and Decreed that the motion to reconsider is not well taken and is hereby over-ruled.

Judge Donald A. DeCessna

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio, CASE NO. 88-CR-329

Plaintiff, JUDGE DONALD A. DECESSNA

-vs- JUDGMENT ENTRY OF CONVICTION

Larry Williams,

Defendant. December 21, 1988

This cause was was called on February 21, 1989, for plea. Present were David Woessner, Assistant Prosecuting Attorney, for the State, and the Defendant with his attorney, John P. Duffin.

As the result of agreement by counsel for the State and the Defense stated on the record in open Court, the Defendant moved to change his plea to Count 1 of the indictment, having waived the service and reading in open Court. The Defendant withdrew his former plea of not guilty and entered his plea of no contest in open Court, to the charge of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

The Defendant's attorney stated that he personally advised Defendant of his constitutional rights, the consequences of the plea, and penalty, as provided by Criminal Rule 11.

Thereafter, the Court addressed the Defendant personally and advised him of his constitutional rights, the consequences of the plea, and penalty, as provided by Criminal Rule 11.

The Defendant, in open Court, in writing, waived his right to trial by jury and signed the petition to plead no contest with a consent to a finding of guilty and plea of no contest with consent to a finding of guilty to the charge of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

The Court then informed the Defendant of the effect of the plea of no contest as required by Criminal Rule 11 (B) and read and reviewed the petition to enter a plea of no contest with a contest to a finding of guilty with the defendant.

The Court then determined from the Indictment that there is a factual basis for the plea of no contest and the plea of no

contest was accepted and the Defendant was adjudged guilty of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree.

IT IS THEREFORE ORDERED AND JUDGMENT RENDERED that the Defendant is convicted of the crime of Trafficking in Marihuana and this case is referred for a pre-sentence investigation, the amount of bond being continued at Defendant's own recognizance, the prosecution having no objection. Defendant to be present for sentencing on March 27, 1989 at 2:30 P.M. Bond to continue during pendancy of appeal.

A copy of this judgment entry of conviction to counsel of record, Adult Probation Department, and the Wood County Sheriff.

Donald A. DeCessna
Judge

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio, CASE NO. 88-CR-329

Plaintiff, JUDGE DONALD A. DECESSNA

-vs- JUDGMENT ENTRY OF SENTENCE

Larry Williams,

Defendant. April 14, 1989

On April 14, 1989, case was called for sentencing pursuant to Criminal Rule 32. Present were David E. Woessner, Assistant Prosecuting Attorney, for the State, and the Defendant, with his attorney, John P. Duffin; the Court having received the pre-sentence report of the Wood County Adult Probation Department.

The Court proceeded under Criminal Rule 32 (A) (1) and statements were received by counsel for the Defendant, the Defendant, and the Prosecuting Attorney. State made no recommendation.

Upon consideration of the matters set forth in R.C. Section 2929.12, Section 2951.02, and other matters pertinent to the sentence which should be imposed, it is,

ORDERED AND JUDGMENT RENDERED by the Court that for the offense of Trafficking in Marihuana, a violation of R.C. Section 2925.03, a felony of the third degree, the Defendant is sentenced to the Ohio Department of Corrections and Rehabilitation and that the Defendant be imprisoned and confined therein for a definite term of one and one-half (1-1/2) years; and a mandatory $4,500 fine.

After determining Defendant to be indigent and unable to pay the statutory fine, the Court suspended the fine under the provisions of R.C. Section 2925.03 (L).

Defendant, having previously entered a no contest plea, was advised of his rights regarding appeal under Criminal Rule 32 (A) (2). Defendant, through counsel, stated his desire to appeal and John P. Duffin was appointed for appeal purposes. A stay of execution of sentence was granted pending appeal.

It is also ordered that the Defendant pay the costs of this prosecution and that the bond be continued pending appeal.

Pursuant to R.C. Section 2967.191 and R.C. Section 2949.12, according to the Wood County Sheriff's Department, the Defendant has not been incarcerated in the Wood County Jail, to the date of sentencing.

A copy of this judgment entry of sentence to counsel of record, Adult Probation Department, Adult Parole Board, and the Wood County Sheriff.

Donald A. DeCessna
Judge

STATUTORY PROVISIONS

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ohio Rev. Code § 2933.21 Search warrant.

A judge of a court of record may, within his jurisdiction, issue warrants to search a house or place:

(A) For property stolen, taken by robbers, embezzled, or obtained under false pretense;

(B) For weapons, implements, tools, instruments, articles or property used as a means of the commission of a crime, or when any of the objects or articles are in the possession of another person with the intent to use them as a means of committing crime;

(C) For forged or counterfeit coins, stamps, imprints, labels, trade-marks, bank bills, or other instruments of writing, and dies, plates, stamps, or brands for making them;

(D) For obscene materials and materials harmful to minors involved in a violation of section 2907.31 or 2907.32 of the Revised Code, but only so much of such materials shall be seized as are [is] necessary for evidence in a prosecution of the violation;

(E) For [any] gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or

gain money or other property, and for money or property won by unlawful gaming;

(F) For the existence of physical conditions which are or may become hazardous to the public health, safety, or welfare, when governmental inspections of property are authorized or required by law.

The enumeration of certain property and material in this section shall not affect or modify other laws for search and seizure.

Ohio Rev. Code § 2933.22 Probable cause.

(A) A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.

(B) A warrant of search to conduct an inspection of property shall issue only upon probable cause to believe that conditions exist upon such property which are or may become hazardous to the public health, safety, or welfare.

Ohio Rev. Code § 2933.23 Affidavit for search warrant.

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Ohio Rev. Code § 2933.24 Contents of search warrant; report of inspection findings.

(A) A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

(B) When a warrant to search commands a proper officer to inspect physical conditions relating to public health, safety, or welfare, such officer, upon completion of the search, shall complete a report of the conditions and file a ocpy of such report with his agency headquarters.

Ohio Rev. Code § 2933.25 Form of search warrant.

Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:

State of Ohio. . . . . County, ss:

To the sheriff (or other officer) of said County, greeting:

Whereas there has been filed with me an affidavit, of which the following is a copy (here copy the affidavit).

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of the said . . . . . of the township of . . . . . in the County aforesaid, and

there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E.F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this . . . . . day of . . . . . .

A.B., Judge, County Court

[Ohio R. Crim. P.]

RULE 41. Search and Seizure

(A) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction, upon the request of a prosecuting attorney or a law enforcement officer.

(B) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any: (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming and describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request

for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

(D) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant.

(E) Return of papers to clerk. The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk.

(F) Definition of property and daytime. The term "property" is used in this rule to include documents, books papers and other tangible objects. The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.

[Fed. R. Crim. P.]

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property of Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable-cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime,

unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and

shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession, premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on an issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.